

MOTION UNDER USC § 2255 TO VACATE, SET ASIDE,
SENTENCE BY A PERSON IN FEDERAL CUSTODY

CORRECT

03-20878

United States District Court		District SOUTHERN DISTRICT OF FLORIDA	
Name of Movant JULIO DAVID ALFONSO		Prisoner No. 66753-004	Case No. 00-1162-CR-MOORE
Place of Confinement FCC-USP COLEMAN, COLEMAN, FLORIDA P.O. BOX 1033 33521-1033			
UNITED STATES OF AMERICA		V. JULIO DAVID ALFONSO (name under which convicted)	
MOTION			
<p>1. Name and location of court which entered the judgment of conviction under attack <u>UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA</u></p> <p>2. Date of judgment of conviction <u>AUGUST 2, 2001</u></p> <p>3. Length of sentence <u>LIFE</u></p> <p>4. Nature of offense involved (all counts) <u>CT-1, violation of 21 USC 846&841/Ct-2 violation of 21 USC §846 &841/violation of 18 USC §1951(a)/CT-3) CT-4 violation of 18 USC 1951(a)&2/CT-5, 18 USC 924(o)/and CT-6 18 USC 924(c).</u></p> <p>5. What was your plea? (Check one) (a) Not guilty <input checked="" type="checkbox"/> (b) Guilty <input type="checkbox"/> (c) Nolo contendere <input type="checkbox"/> </p> <p>If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details:</p> <p>_____</p> <p>_____</p> <p>_____</p> <p>6. If you pleaded not guilty, what kind of trial did you have? (Check one) (a) Jury <input checked="" type="checkbox"/> (b) Judge only <input type="checkbox"/> </p> <p>7. Did you testify at the trial? Yes <input checked="" type="checkbox"/> No <input type="checkbox"/> </p> <p>8. Did you appeal from the judgment of conviction? Yes <input checked="" type="checkbox"/> No <input type="checkbox"/> </p>			

9. If you did appeal, answer the following:

(a) Name of court ELEVENTH CIRCUIT COURT OF APPEALS

(b) Result AFFIRMED

(c) Date of result APRIL 18, 2002

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any federal court?

Yes ☐ No ☒

11. If your answer to 10 was "yes," give the following information:

(a)(1) Name of court N/A

(2) Nature of proceeding N/A

(3) Grounds raised N/A

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes ☐ No ☒

N/A

(5) Result N/A

(6) Date of result N/A

(b) As to any second petition, application or motion give the same information:

(1) Name of court N/A

(2) Nature of proceeding N/A

(3) Grounds raised N/A

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes ☐ No ☒

N/A

(5) Result _____

N/A

(6) Date of result _____

(c) Did you appeal, to an appellate federal court having jurisdiction, the result of action taken on any petition, application or motion?

(1) First petition, etc. Yes ☐ No ☐ N/A

(2) Second petition, etc. Yes ☐ No ☐

(d) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not:

N/A

12. State *concisely* every ground on which you claim that you are being held in violation of the constitution, laws or treaties of the United States. Summarize briefly the facts supporting each ground. If necessary, you may attach pages stating additional grounds and facts supporting same.

CAUTION: If you fail to set forth all ground in this motion, you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in these proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you have other than those listed. However, you should raise in this motion all available grounds (relating to this conviction) on which you based your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The motion will be returned to you if you merely check (a) through (j) or any one of the grounds.

- (a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily or with understanding of the nature of the charge and the consequences of the plea.
- (b) Conviction obtained by use of coerced confession.

- (c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.
- (d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.
- (e) Conviction obtained by a violation of the privilege against self-incrimination.
- (f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.
- (g) Conviction obtained by a violation of the protection against double jeopardy.
- (h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impanelled.
- (i) Denial of effective assistance of counsel.
- (j) Denial of right of appeal.

A. Ground one: Fundamental/Structural Error in reference to Apprendi v. New Jersey, rendering petitioner's conviction and sentence invalid.

Supporting FACTS (state *briefly* without citing cases or law) _____

(See Brief and memorandum of law)

B. Ground two: Court's lack of jurisdiction to charge, prosecute, convict and sentence petitioner.

Supporting FACTS (state *briefly* without citing cases or law): _____

(See Brief and memorandum of law)

C. Ground three: Federal Court's Lack of Jurisdictional requirements, violation of the government's petite policy and no proof of executive officer authorization.

Supporting FACTS (state *briefly* without citing cases or law): _____

(See Brief and memorandum of law)

D. Ground four: Actually innocent of violating Title 18 U.S.C. § 924(c).

Supporting FACTS (state *briefly* without citing cases or law): _____

(See Brief and memorandum of law)

13. If any of the grounds listed in 12A, B, C, and D were not previously presented, state briefly what grounds were not so presented, and give your reasons for not presenting them: _____

The present claims have been raised because counsel has failed to preserve the issues in the district court at anytime, and counsel failed to raise the issues on direct appeal.

14. Do you have any petition or appeal now pending in any court as to the judgment under attack?

Yes ☐ No ☒ XXX

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing Louis Casuso

111 N.E. First Street, Suite 607, Miami, Florida 33132

(b) At arraignment and plea Same as above

(c) At trial Same as above

(d) At sentencing Same as above

(e) On appeal SAME AS ABOVE

(f) In any post-conviction proceeding N/A

(g) On appeal from any adverse ruling in a post-conviction proceeding _____

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at approximately the same time?

Yes ☒ No ☐

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?

Yes ☐ No ☒

(a) If so, give name and location of court which imposed sentence to be served in the future: _____

(b) Give date and length of the above sentence: LIFE

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?

Yes ☐ No ☒

Wherefore, movant prays that the Court grant him all relief to which he may be entitled in this proceeding.

Signature of Attorney (if any)

I declare under penalty of perjury that the foregoing is true and correct. Executed on

April 7, 2003
(date)

Julio Alfonso
Signature of Movant

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

JULIO DAVID ALFONSO,	:	
	:	
Petitioner,	:	
	:	CRIMINAL ACTION NO: 00-1162-CR- Moore
vs.	:	
	:	CIVIL ACTION NO: _____
UNITED STATES OF AMERICA,	:	
	:	
Respondent.	:	
_____	:	

**MEMORANDUM OF LAW IN SUPPORT OF
PETITIONER MOTION TO VACATE, SET ASIDE, OR
CORRECT SENTENCE PURSUANT TO 28 U.S.C. §2255**

COMES NOW the petitioner, Julio David Alfonso, in propria persona in the above styled cause, and presents this Honorable Court with the following memorandum of law in support of petitioner motion to vacate, set aside, or correct sentence.

This Court in reviewing each claim should address the merits of each claim, regardless of the legal theories, poor syntax, sentencing construction, or litigant's unfamiliarity with pleading requirements. Overall, an evidentiary hearing should be held in the event any fact is in dispute with the petitioner's claim. See title 28 U.S.C. §2246.

Therefore, the petitioner submits the following brief in support of his §2255 application seeking to vacate, set aside and correct his sentence.

**FUNDAMENTAL AND/ OR STRUCTURAL ERROR IN REFERENCE
TO APPRENDI V. NEW JERSEY, RENDERING THE PETITIONER'S
CONVICTION AND SENTENCE INVALID**

The petitioner brings to the court's attention that fundamental and/or structural error has occurred in reference to his conviction and sentence pursuant to Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). The petitioner's conviction and sentence has been rendered void.

It is now clearly, established, and undisputable law that drug type and quantity are now elements of drug offense pursuant to Title 21 U.S.C. §§ 841, 846, and all relevant drug statutes as settled in Apprendi. Consistent with drug type and quantity being elements of a federal drug offense, the drug type and quantity must be charged in the indictment, submitted to the jury, and proven beyond a reasonable doubt. See U.S. v. Rogers, 228 F.3d 1318 (11th Cir. 2000). The Eleventh Circuit has conceded to the fact that Apprendi errors affects substantial rights. See U.S. v. Swatzie, 228 F.3d 1278, 1284 (11th Cir. 2000).

The petitioner brings to the court's attention that it was well settled law prior to Apprendi that the government had to prove that a defendant had a detectable amount of a controlled substance in order to obtain a federal drug conviction pursuant to Title 21 U.S.C. §§ 841, 846, and all relevant drug statutes. See Chapman v. U.S., 500 U.S. 453, 111 S.Ct. 1919, 114 L.Ed.2d 524 (1991).

Additionally, the United States sentencing guidelines provide that, unless otherwise specified, the weight of a controlled substance, as set forth in the drug quantity table; refers to the entire weight of any mixture of substance containing a detectable amount of the controlled substance. See **U.S.S.G. 2D1.1(c), (N*)(drug quantity table)**. The Supreme Court held that "so long as [the mixture] contains a detectable amount [of a controlled substance], the entire mixture or substance is to be weighed when calculating the sentence." *Id.* at 459, 111 S.Ct. at 1924.

In early December, 2000, a Miami-Dade Police Department confidential source told officers that two individuals later identified as defendant's Alfonso and Enamorados were committing armed robberies while posing as police officers and were interested in committing a drug-related armed robbery. Miami-Dade officers directed the source to introduce the defendants to an undercover officer, who would pose as a disgruntled drug dealer interested in arranging such a drug "ripoff" in order to obtain money that his "boss" allegedly owed him.

Between December 7, and December 19, 2000, the undercover officer spoke with both defendants several times on the telephone and met with both defendants twice in person. All of these calls and meetings were recorded. At the first meeting, the undercover officer conveyed the story that his "boss" the son of his original employer owed him money from a drug deal and had refused to pay. The undercover officer told the defendants

that the son expected to receive a shipment of 37-40 kilograms of cocaine at the Port of Miami in the near future and that the undercover's job was to retrieve the cocaine and take it to a stash house for safekeeping prior to distribution. The undercover officer then told the defendants that **he wanted them to steal the cocaine from the occupied stash house**, and that the three of them could share the proceeds from the sale of the cocaine.

On December 19, 2000, the undercover officer called the defendants to tell them the cocaine had arrived and ask whether the defendants were completely ready to commith the armed home invasion. The defendants assured the undercover officer that they were ready. The undercover officer then directed the defendants to follow one of the undercover's officer's **a confidential source whom the defendants had previously met** to a warehouse office, at which time the undercover officer would call the defendants with an address for the stash house.

Likewise, the pre-sentence report and the governments argument at sentencing only offered conclusory allegations that there existed a detectable amount of cocaine involved in this case. Considering the fact that drug type and quantity are now elements of all federal drug offenses, and the fact that drug type and quantity determine a defendant's minimum and maximum sentence, the District Court is now under a duty to instruct the jury of those elements during the jury instructions, in order for the jury to determine guilt. As the sentencing guidelines have

clearly defined to mean only a drug substance that contains a detectable amount of a controlled substance, in this case, cocaine can determine a defendant's sentence, it was erroneous for the petitioner to be convicted and sentenced for five or more kilograms, when the quantity of drugs was never proved and never existed. See U.S. v. Jackson, 115 F.3d 843 (11th Cir. 1997). In Jackson, the Eleventh Circuit set out clearly how there must be a detectable amount of cocaine for sentencing purposes prior to Apprendi. *Id.*

Although, Jackson, does not squarely address the matters of drug type and quantity being elements, it does involve a defendant being sentenced erroneously when there did not exist the detectable amount of cocaine for sentencing purposes. Now that Apprendi has been established, the petitioner's conviction and sentence is unconstitutional, and must be vacated. From the onset of the present case, its clear that the government conceded that there existed no drugs (cocaine) in reference to the drug charges charged in this case. In fact, the alleged robbery and the alleged cocaine to be stolen were fiction. Now, applying Apprendi to the present case, as the petitioner was entitled to its application from the onset of the case. Drug type and quantity had to be charged in the indictment, presented to the jury, and proved beyond a reasonable doubt. *Id.* Apprendi, *supra*.

Reveiwing the jury instructions of the present case, the District Court did not inform or instruct the jury that drug

type and quantity were elements of the drug offenses charged in the indictment. Additionally, the jury did not make a determination of guilt on the required elements of drug type and quantity. *Id.* Jury instructions and jury's guilty verdict. The court's actions deprived the petitioner of his substantial due process right of being found guilty by the jury based on all the required elements of an offense. See Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1970).

The petitioner's attorney failed to object to the Apprendi error at anytime in the present case, yet, fundamental and structural error has been committed, as the petitioner has suffered the loss of a constitutional protection in reference to guilt being determined pursuant to the federal due process clause. Relief is due without the application of plain or harmless error. The record in this case clearly supports the facts stated by the petitioner, and his conviction and sentence must be vacated.

The petitioner brings to this Court's attention that structural error has long since existed, yet, this Court and other courts have erroneously and consistantly applied plain and harmless error in reference to Apprendi errors. See Arizona v. Fulminante, 499 U.S. 279,307-08, 111 S.Ct. 1246,1264, 113 L.Ed.2d 302 (1991) and U.S. v. Swatzie, *supra*. As settled by the Supreme Court, without certain basic or structural protections, a criminal trial or proceedings cannot reliably serve its function as a vehicle for determining guilt or innocence, and no criminal punishmnet may be regarded as fundamentally

fair. See Rose v. Clark, 478 U.S. 570, 577-78, 106 S.Ct. 3101, 3105-06, 92 L.Ed.2d 460 (1986). Due to structural error, whether a defendant objects or fails to object to such error is simply irrelevant. **Id.**

The Supreme Court has recently shed light on the manner in which to analyze structural error. See California v. Roy, 519 U.S. 2, 136 L.Ed.2d 266, 117 S.Ct. 266 (1996). In Roy, the Supreme Court noted:

"the specific error at issue here an error in the instruction that defined the crime is as easily characterized as a mis-description of an element of the crime, as it is characterized as an error of omission." **Id.** 117 S.Ct. at 339. Unlike the defendants in Roy, the petitioner makes the contention that the error at issue here, is of the structural sort that defies analysis by the harmless error standard. The jury has been misinformed in reference to the elements of the drug charges the petitioner has been convicted of, specifically, after the law established in Apprendi, rendering drug type and quantity elements of a drug offense pursuant to Title 21 U.S.C. §§ 841, 846, and all relevant drug statutes has been settled.

Certainly, there has been violation of the federal due process clause, and structural error has occurred, where the jury was not instructed that it had to determine drug type and quantity as an element of the offense charged. Also, because the government failed to prove that any drugs existed beyond a reasonable doubt, the petitioner's conviction must be vacated.

**DISTRICT COURT'S LACK OF JURISDICTION
TO PROSECUTE, CONVICT, AND SENTENCE
PETITIONER.**

The petitioner contends that the District Court has prosecuted, convicted, and sentenced him in a Federal Court, in clear absence of any jurisdiction. This clearly lacked exclusive, legislative, territorial, and subject matter jurisdiction to prosecute, and convict, and sentence the petitioner.

The petitioner brings to the Court's attention that the law has long since been established that the Court may challenge sua sponte subject matter jurisdiction. See Louisville v. Nashville P. Co. v. Mottley, 211 U.S. 149, 29 S.Ct. 42, 53, ____ L.Ed. 126 (1908). Additionally, the law is established that the Court is under a duty to review whether it has jurisdiction whenever the question arises. See Philbrook v. Glodgett, 421 U.S. 707, 44 L.Ed. 525, 95 S.Ct. 1893 (1975). Overall, its well established law that a federal judge can face civil action when it acts in clear absence of all jurisdiction. See Stump v. Sparkman, 435 U.S. 349, 98 S.Ct. 1099, 55 L.Ed.2d 331 (1978).

The instant case involves a so called reverse sting where a Metro Dade Police Officer, a agent from the Bureau of Alcohol, tobacco and firearms and C.I., working in conjunction with each other, fabricated a robbery of a shipment of ____ kilograms of cocaine with the petitioner and his codefendants.

At no time did the alleged robbery of the cocaine effect interstate commerce, nor did it occur on land or grounds

where the federal government exercised exclusive jurisdiction. The alleged robbery occurred within the City of Miami, where the State of Florida exercises exclusive and legislative jurisdiction. Of overall importance, the federal government has yet to establish jurisdiction to arrest, prosecute, and convict the petitioner, nor has the federal government presented any evidence of jurisdiction to do the same. Its clear that the federal government does not have exclusive, legislative, concurrent, territorial, nor subject matter jurisdiction in this case.

**THE FEDERAL COURT'S LACK OF JURISDICTION
TO CHARGE, PROSECUTE, CONVICT AND SENTENCE
THE PETITIONER.**

The petitioner contends that he has been charged, prosecuted and convicted in federal court, and the federal court clearly lacked subject matter, territorial and legislative jurisdiction to charge, prosecute and convict the petitioner.

The Supreme Court has long since settled the law that under our federal system, "the states possess primary authority for defining and enforcing the criminal law." See, Brecht v. Abrahamson, 507 U.S. 619, 635, 113 S.Ct. 1710, 1720, 123 L.Ed.2d 353 (1993); and Engle v. Isaac, 456 U.S. 107, 128, 102 S.Ct. 1558, 1572, 71 L.Ed.2d 783 (1982). The following authority has clarified that "national government is one of the delegated powers alone. Under our federal system, the administration of criminal justice rests with the states except as Congress, acting within the scope of those delegated

powers, has created against the United States." The Tenth Amendment confirms that the power of the federal government is subject to limits that may, in a given instance, reserve power to the states. Further support for this legal precedent, which has never been repealed is found in New York v. United States, 505 U.S. 144, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992).

The Supreme Court clarified that "the Constitution does not protect the sovereignty of states for the benefit of the public officials governing the statutes. To the contrary, the Constitution divides authorities between federal and state government for the protection of individuals." *Id.* New York v. United States, supra. The Supreme Court concluded that a "healthy balance of power between the states and federal government will reduce risk of tyranny and abuse." [Emphasis added] *Id.* New York v. United States, 120 L.Ed.2d at 154. The Supreme Court in a recent decision, addressed the issues of exclusive legislative jurisdiction of Congress, the powers of the federal government, and the subsequent matter of Federal District Courts. See, United States v. Lopez, 514 U.S. 549, 131 L.Ed.2d 626, 115 S.Ct. 1624 (1993). In conclusion, Justice Thomas stated in Lopez:

"If anything, the wrong turn was the court's dramatic departure in the 1930's from a century and half precedent." *Id.* Lopez, 115 S.Ct. 1624.

Justice Thomas summed up his opinion dramatically with the statement:

"If we were to be true to a constitution that

does not cede a police power to the federal government ... [Emphasis added].

The following facts in Lopez, clarified the federal government's limited jurisdiction in dealing with matters that do not have substantial effect on Congress.

The following facts in Lopez, clarified the federal government's limited jurisdiction in dealing with matters that do not have a substantial effect on Congress.

Supreme Court has only recently made a determination on what affect activity must have in order to be within Congress 'power to regulate interstate commerce. See, United States v. Lopez, supra. The Supreme Court settled the law that activity must have a substantial affect on commerce in order to be within Congress' power to regulate it under the commerce clause. Id. Lopez, 115 S.Ct. at 1630. The Supreme Court's decision in Lopez invalidates all recent precedent holding that the government need only show a de minimus effect on commerce to support a federal conviction where interstate commerce is a required element. The government is now under a duty to show a substantial effect on commerce to support the conviction in this case.

Here the petitioner does not contest the constitutionality of Title 18 U.S.C. §924(C) and Title 21 U.S.C. § 846. The petitioner contends that the federal court lacked jurisdiction to prosecute, convict and sentence him for several reasons. First, the charging indictment in this case failed to state

any allegations of jurisdictional facts in the indictment, other than the boiler plate recitation that the drugs and handguns had been transported, shipped or received in interstate commerce, which is insufficient to satisfy the federal jurisdictional requirement.

The absence of jurisdictional facts, along with the absence of clear finding in the statute or legislative history of Title 18 U.S.C. § 924(C) and Title 21 U.S.C. § 846 that the local crimes sought to be regulated have a substantial impact on interstate commerce, different from murder, robbery, rape burglary, theft or any other interstate crime, renders the indictment fatally defective. No where in the charging indictment in this case, does it state that the local robbery or drug charge had substantial affect on interstate commerce as now required in Lopez.

The petitioner's claim addresses the law in reference to Lopez which requires a substantial affect on interstate commerce in order for the federal government to prosecute. There exist no such affect on interstate commerce here, which warrants the petitioner's conviction to be vacated.

**FEDERAL COURT'S LACK OF JURISDICTIONAL REQUIREMENTS
VIOLATION OF THE GOVERNMENT'S PETITE POLICY AND NO
PROOF OF EXECUTE OFFICER AUTHORIZATION.**

The Supreme Court has often determined that statutes and regulations violates due process rights if they are so vague as to give police or government officials to much discretion in enforcement. See, Kolender v. Lawson, 461 U.S. 352, 103 S.

Ct. 1855, 75 L.Ed. 2d 903 (1983); Smith v. Goguen, 415 U.S. 566, 94 S.Ct. 1242, 39 L.Ed.2d 605 (1974); and Marcus v. Search Warrant of Property, 367 U.S. 717, 81 S.Ct. 1708, 6 L.Ed.2d 1127 (1961).

It appears such a violation has occurred here, as there is not evidence of who appointed the petitioner's case to the federal government, nor was there authorization from a executive officer of the Department of Justice, authorizing federal prosecution of the petitioner.

The Supreme Court has long since explained that the exception of the federal laws under our constitution is confided primarily to the executive branch of government, subject to applicable constitutional and statutory limitations and to judicially fashion rules to enforce those limitations. See, U.S. v. Russell, 411 U.S. 423,435, 93 S.Ct. 1637,1644, 36 L.Ed.2d 366 (1973). No executive branch official has played a role in the federal investigation of the petitioner, nor has any executive branch official authorized the petitioner to be federally prosecuted.

The Supreme Court confirmed that when challenged, jurisdiction must be demonstrated, shown and proven to lawfully exist before a cause may lawfully proceed on the merits. See, Thompson v. U.S., 444 U.S. 248, 62 L.Ed.2d 457, 100 S.Ct. 512 (1980). Thompson clarifies that a Department of Justice official has to authorize federal prosecution of a defendant after a state prosecution of the same offense. *Id.* Although, the

present case was not prosecuted by the State of Florida, the case originated in the State of Florida Court's jurisdiction, and there has been no executive branch officer from the Department of Justice, or any other branch of the federal government, to authorize the federal prosecution of the petitioner. The government must establish jurisdiction to prosecute the petitioner in compliance with the law of the United States.

Title 18 U.S.C. § 7 specifies that the territorial jurisdiction of the United States extends only outside of the boundaries of lands belonging to any of the fifty states. Title 40 U.S.C. § 255 specifies the legal conditions that must be fulfilled for the United States government to have exclusive or shared jurisdiction within the area of land belonging to the States of the Union. The government has failed to comply to either statute as stated above, and therefore, has failed to prove that it had jurisdiction to charge, prosecute, convict and sentence the petitioner in the present case. See, Adams v. U.S., 319 U.S. 312, 63 S.Ct. 1122, 87 L.Ed. 1421 (1943).

The petitioner demands that this Court establish the required jurisdiction to prosecute him pursuant to the petite policy and the petitioner demands this court to establish the required exclusive jurisdiction that has been merely assumed in this matter consisting of:

1. Documentation showing authorization from the Department of Justice, authorizing the federal prosecution of the petitioner pursuant to the petite policy.

2. Documentation showing ownership of each and every geographical location mentioned in the indictment wherein alleged criminal activity took place. Including authorization from an executive branch official, authorizing federal prosecution of the petitioner.

3. Documentation from legislation of State of Florida surrendering jurisdiction to the federal government over the same geographical location as in number one.

4. Documentation pursuant to Title 40 U.S.C. §255, wherein the United States accepted jurisdiction to the same geographical location as specified in number one, or documentation showing concurrent jurisdiction, with the State of Florida over the geographical location in number 2, or absent the production of such required documentation showing lawful federal jurisdiction over this geographical location, or dismiss this action entirely.

Given the fact that the prosecution failed to prove subject matter, legislative, or territorial jurisdiction, the petitioner is entitled to relief.

This Court should vacate any and all judgements against the petitioner for the United States lack of jurisdiction to arrest, prosecute, or incarcerate the petitioner, and the United States failure to prove jurisdiction to prosecute the petitioner from the onset.

**INEFFECTIVE ASSISTANCE OF COUNSEL
ACTUAL INNOCENT OF VIOLATING TITLE 18 U.S.C. § 924(c)**

The petitioner contends that he has suffered a sixth Amendment right violation of ineffective assistance of counsel, for his attorney allowing him to be convicted of an offense pursuant to Title 18 U.S.C. § 924(c), when is actually innocent of the charged offense.

Its settled law that in order to find a defendant guilty of a charge pursuant to Title 18 U.S.C. § 924(c), the government must prove: (1) that the defendant knowingly used or carried a firearm, and (2) the use or carrying of the firearm occurred during and in relation to a crime of violence or drug trafficking crime. See U.S. v. Mount, 161 F.3d 675 (11th Cir. 1998). Only recently, the Supreme Court has ruled that there must be some form of use, carrying, brandishing, etc... of the firearm during the commission of the crime of violence or the drug trafficking crime. See Bailey v. U.S., 516 U.S. 137, 133 L.Ed.2d 472, 116 S.Ct. 501 (1995). In the instant case, the government has failed to prove that the petitioner was involved in a crime of violence, or substance offense particularly, robbery and distribution of drugs.

Additionally, the government has not proved that the petitioner carried a firearm during a crime of violence or drug trafficking crime as required by the law. See Muscarello v. U.S., 524 U.S. 125, 118 S.Ct. 1911, 141 L.Ed.2d 111 (1998). As set out in the petitioner's previous claims, the robbery and drugs alleged in this case were fictitious. There is simply no evidence in the record that a robbery or a drug offense was going to occur,

nor could the petitioner have been convicted for using and/or carrying a firearm during and in relation to a drug trafficking offense. As pointed out by the petitioner previously, the alleged robbery of drugs and any anticipated conspiracy was fiction from the onset of this case. Given this fact, no firearm could have been used or carried in the present case. as there existed not predicate offense. The actual innocence of Murray v. Carrier, 477 U.S. 478, 91 L.Ed.2d 397, 106 S.Ct. 2639 (1986), is applicable to the present case, and the petitioner's § 924(c) conviction must be vacated.

For the following reasons stated, the petitioner's § 924(c) conviction must be vacated, and the case ordered back to the district court for further proceedings in compliance with the present claim.

INEFFECTIVE ASSISTANCE OF COUNSEL

The petitioner contends that he has been deprived of the effective assistance of counsel as guaranteed by the Sixth Amendment of the United States Constitution solely because of his trial and appellate counsel's deficient performance.

The petitioner's trial and appellate counsels failed to raise more meritorious issues on the petitioner's behalf in the District Court and on direct appeal.

The Sixth Amendment in part provides, in all criminal prosecutions, the accused shall enjoy the right to have assistance of counsel for his defense. The Sixth Amendment right to defense counsel in felony prosecutions is a fundamental right on the states through the Fourteenth Amendment as well. See, Strickland v. Washington, 466 U.S. 688, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984), and Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). The standard which must be applied in determining what constitutes ineffective assistance of counsel are set forth in Strickland, supra.

The Strickland test has two components, both of which must be satisfied to establish that defense counsel's performance was ineffective. *Id.* at 687. This requires showing that counsel errors were so serious that counsel was not functioning as the counsel guaranteed by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. To make this showing, the defendant must demonstrate that counsel's

errors were so serious as to deprive the defendant of a trial, a trial whose result is reliable. A court deciding an ineffective assistance of counsel claim must judge the reasonableness of counsel challenged conduct. A convicted defendant making claims of ineffective assistance must identify the acts of omission of counsel that are alleged not to have been the result of reasonable professional judgement. The court must determine whether, in light of all the circumstances whether the identified acts or omissions were outside the wide range of professional competent assistance. *Id.* at 690.

The Supreme Court recognized in Strickland, that counsel bears a duty to make a reasonable investigation of the law and facts in his client's case. *Id.* at 691.

Additionally, the ABA standards relating to Administration of Criminal Justice in part provides:

It is the duty of the lawyer to conduct prompt investigation of circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should always include effort to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exist regardless of the accused stated desire to plead guilty.

Standard 4-4.1.

The Supreme Court has also established that the standard for ineffective assistance of counsel is the same for trial and appellate counsel. See, Evitts v. Lucey, 469 U.S. 387, 83 L.Ed.2d 821, 105 S.Ct. 830 (1985).

In the instant case, the petitioner's attorney never informed him that drug type and quantity were elements of a federal drug offense, nor did counsel compel the government or the court to prove beyond a reasonable doubt, drug type and quantity. Overall, counsel failed to have the jury instructed, or have the court instruct the jury that drug type and quantity were substantial elements in determining guilt. The petitioner's attorney also allowed the federal government to prosecute him, where the federal government lacks subject matter jurisdiction to prosecute, convict, and sentence him for the offenses involved in the present case. The petitioner was deprived of a fair trial solely because of his attorney's errors. Counsel's actions fell far below the required standard of competent counsel here.

This court, reviewing the applicable law in reference to counsel's deficient performance in representing a defendant, as settled in the Eleventh Circuit, can only come to the conclusion that the petitioner was deprived of the guiding hand of counsel guaranteed by the Sixth Amendment. See Aldrich v. Wainwright, 777 F.2d 630, 631 (11th Cir. 1985), Code v. Montgomery, 899 F.2d 1481 (11th Cir. 1986), Workman v. Tate, 957 F.2d 1339, 1345 (11th Cir. 1992) and Matire v. Wainwright, 811 F.2d 1430 (11th Cir. 1987). The petitioner's ineffective assistance of counsel claims are availing and the petitioner is entitled to relief. This Court should take notice that all claims being raised in the present motion are being raised solely because of counsel's failure to present or raise the issues in the district court and on direct appeal. There exist an exception for those claims raised for fundamental and/or structural error.


For the following reasons stated, the petitioner's conviction and sentence should be vacated, and the case remanded back to the district court for compliance with the present claims. Moreso, because the merits of the petitioner's claims in this motion has yet to be addressed.

CONCLUSION

This court should readily address the merits of the petitioner's claims and/or hold an evidentiary hearing to resolve the errors that have occurred here, all being fundamental and/or jurisdictional errors. The petitioner request an evidentiary hearing to resolve these matters as a fundamental miscarriage of justice has occurred, that affects the fundamental fairness of the proceedings and the court. See U.S. v. Addonizio, 442 U.S. 178, 185, 99 S.Ct. 2235, 2240, 60 L.Ed.2d 805 (1979).

Wherefore, the petitioner is entitled to relief in reference to the claims presented to this court, or an evidentiary hearing should be held without haste.

Respectfully Submitted,




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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing
has been forwarded to the following parties listed below by way
of United States Mail on this 7 day of April 2003.

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